



## REPUBLIC OF KENYA

- 1) Running Down Cause
- 2) Male adult aged 28 years old in 1996
- 3) Pedestrian run down by motor vehicle
- 4) Injuries: as pleaded
  - i. Bruises on face and head injury
  - ii. Fracture mid shaft femur
  - iii. Unconsciousness for 30 minutes
  - iv. Fracture mid shaft left tibia
- 5) Liability: 100% against the defendant
- 6) Quantum:
  - a) General Damage
    - i) Pain suffering an loss of amenities Ksh.150,000/
    - b) Special Damages  
Withdrawn and abandoned
    - c) Loss of earnings -Nil
  - 7) Case law
    - i) Geoffrey Mwangi Githikero vs Beatrice Thomas  
Nbi Hccc 88/98, Ang'awa, J
    - ii) Lucy Wambui Mbugua v Maina Macharia  
Nakuru Hccc 192/98 Ondeyo, J.
    - iii) Fredrick Onyango Owiti v Gabriel Muli & Another  
Nairobi Hccc 446/94, Ondeyo J
    - iv) Simon Githiomi v Peter Wachira  
Nakuru Hccc 91/93, Rimita, J.
    - v) James Maina Mwogora v Shira Engineering Works Limited  
Nairobi 2957/90, Omolo J (as he then was)
- 8) Advocates:

F.M. Kalwa Advocate for the plaintiff

J.K. Onditi Advocate for the defendant

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIV CASE 1321 OF 97**

**MULWA MUSYOKA ..... PLAINTIFF**

**VERSUS**

**WADIA CONSTRUCTION ..... DEFEDANANT**

**JUDGMENT**

The suit before me concerns a motor traffic accident between a pedestrian, one Mulwa Musyoka and a motor vehicle belonging to the defendant M/s K.J. Patel & Co. Ltd; that occurred on the 17th of September 1996.

Briefly, the facts of this case is as follows:-

Mulwa Musyoka, (herein referred to as the plaintiff) was walking along the Mombasa-Nariobi road. When he neared the edge of the road at Ramco courts, his intention was to cross the road. He waited to the side of the road for the on coming vehicles to pass. Suddenly a motor vehicle belonging to the defendant left its side of the road and ran him down.He lost consciousness and was rushed to the Kenyatta National Hospital. He was found to have sustained fractured injuries to the femur and tibia of his left leg.

Four months later he left the hospital on crutches.

He sued M/s Wandia Construction Co. Ltd as the owners of the motor vehicle. On the 3.6.97 the defendants filed defence and denied that they were negligent. They attributed the negligence on the plaintiff.

As was common in the past, the suit came for hearing on the several occasion but no record was made on the file (21 & 22.1.98; 15 &16.6.98, 8 & 9 July 98; 13 and 14 July 99; 14 and 15 July 99).

The plaintiff amended their plaint with leave of the court and as per orders of Githinji J (as he then was) on the 17.9..01. The effect of this amendment saw the defendants change from

M/s Wadia Construction Co. Ltd. to M/s K.J. Patel & Co. Ltd (this court has jurisdiction to hear this suit).

By now the parties had both changed advocates.

The plaintiff were originally being represented by Waruhiu & Muite; M/s Waruhiu Kamande & Nganga Advocates; then M/s Kabura & Co. Advocates who conducted the trial for the plaintiff.

The defendants were originally represented by M/s Maoso & Co. Advocates then M/s Okundi & Co. Advocate who conducted the trial for defendant.

I outline these facts and information because of the circumstances of this file. I appear to have the original file. The advocates informed me the file had been reconstructed. The actual file had an enormous amount of pleading missing. Prior to the trial both advocates were kind enough to supply this court with copies of the pleadings to enable the trial proceed.I therefore do not know what occurred between year 2003 and 2004 and how this matter came for hearing.When it did come for hearing the parties took three days to get the file in order which I thank them for so doing to enable the trial proceed.

I now look at the issue of liability:-

## A) LIABILITY

Issues (a),(b) and (c)

Whether the defendants driver, servant or agent

drove motor vehicle Reg. number KUY 984 negligently as

alleged or at all?

Whether the plaintiff ran across the road negligently as alleged or at all?

Whether the accident was partly caused by the negligence on the

part of the defendant's driver, servant and/or agent or partly by the

negligence on the part of the plaintiff; if so in what respective proportions of contributory negligence?

I have only the evidence of the plaintiff. The defence called no evidence.

The plaintiff denied that he was crossing the road. He was standing at the edge of the road preparing to cross the road. The defendants vehicle appeared to have lost control as it travelled at a high speed and collided into him thus causing him injuries.

I would believe this evidence and find the plaintiff was run over whilst off the road. I would further find that he was not crossing the road nor did he contribute to the said accident.

The issue of liability is assessed at 100% against the defendant.

## C) QUANTUM

1: General Damages

a) Pain and suffering

The plaintiff was examined by:

Dr. M. Kuria Kamau

Medical Practitioner

MB ChB (Nbi)

This medical report was prepared on the 2.2.04 the first day the trial was to be held. It was put in by consent of both the parties. The doctor was not an othopedic.

The doctor confirmed that the plaintiff sustained:-

a) Closed head injury with loss of consciousness for about 30 minutes

b) Cut wound on the face

c) Closed left femoral fracture

d) Closed left tibial fracture

The opinion by the doctor was that the femur fracture healed with a malunion whilst the tibial fracture healed in the normal way. There was a shortening of the limb causing an abnormal gait. The plaintiff may require prosthetic shoes.

The advocate for plaintiff prayed for an award of Ksh.700,000/- to be awarded. Here, he based his submissions on the case law of:-

Geoffrey Mwangi Githikiro

V

Beatrice Thomas

Hccc 88/1988

Nairobi, Ang'awaJ

In the above case the plaintiff, a pedestrian male adult was run down by a motor vehicle. He sustained fractures of both legs and was in hospital for about 182 days. The injuries was complicated by the non union of both legs. As plates were not fitted the legs formed a bowing shape. Award of Ksh.400,000/- was given.

The advocate for the defendant relied on the case law from the Nakuru High Court of Kenya.

Lucy Wambui Mbugua

V

Maina Macharia

Hccc 192/98,Ondenyio J

The plaintiff – lawful passenger was involved in a motor vehicle accident. An Interlocutory Judgment was entered against the defendant. The plaintiff had a dislocation of the wrist, fracture of the head of the right femur; deep cuts to the right leg and left foot together with abdominal injuries. She had an operation to the small gut mesentary. She had a shortening of the leg and had arthritis. An award of Ksh.265,000/- was made of General damages pain and suffering.

a) Fredrick Onyango Owiti

Vs

Gabriel Muli & Another

Nakuru Hccc 446/94, Ondeyo,J.

The plaintiff was a legal representative of the deceased who was a passenger in a motor vehicle. The deceased then suffered a fracture of the skull cuts on the right knee injuries to the neck and right shoulder. (Her death was caused by natural causes). No fracture was detected and it was found in evidence there was no fractured skull. An award of Ksh.200,000/- was made.

C) Simon Githiomi

V

Peter Wachira

Nairobi Hccc. 91/93, Rimita, J.

The plaintiff was a fare paying passenger in a vehicle travelling along the Nakuru/Nairobi road. The vehicle did not stop on seeing another vehicle stopped by the police. The vehicle collided with another causing the plaintiff to sustain injuries of the fracture of the neck of the right femur dislocation of the limbs and cuts on the forehead and nose. An award of Ksh.350,000/- was made.

An older case by Omolo J (as he then was) was relied on being:

James Maina Mwogora

V

Shira Engineering Works Limited

Nairobi Hccc 2957/90

This case was an industrial accident suit. The plaintiff was injured in the course of his employment whilst off loading iron sheets from a vehicle. Some of the iron sheets fell on top of the plaintiff's left leg thus causing him injuries resulting to a compound fracture. A wound on the left leg discharged pus. His left leg was bent. The plaintiff found it difficult to walk.

A sum of Ksh.250,000/- was awarded.

In this case, the plaintiff herein sustained fractures in two places at the left leg. One at the femur and the other at the tibia. This fracture was less serious than the above case which injury appears to perhaps be more relevant than the former three.

I note the authorities submitted, whereby no fracture was noted in the Fredrick Onyango Owiti case (supra). The case law produced by the plaintiff spoke of fractures to both legs. I admit the award there was a bit on the higher side. This was contributed to the fact that there were difficulties in the healing of the fractures. The said authorities have a lot of typographical error which should be corrected.

I find that in this case an award of ksh.150,000/- is sufficient for the injuries that were sustained.

#### D) Special Damages

The pleadings had prayed for:-

“further particulars of Special Damages

continuing and to be ascertained at the time

of hearing hereof.”

The plaintiff failed to amend his plaint to reflect these continuing Special Damages. The claim that was actually pleaded was for a police abstract report fee of 100/- and a medical report fee of Ksh.1,500/-. The plaintiff withdrew and abandoned this claim prior to the hearing of the suit.

The claim under Special Damages stands withdrawn

#### . C) Loss of earning

The plaintiff's pleading states he earned a salary of Ksh.3,000/- per month. The plaintiff in evidence states he now works as a second hand clothes dealer. When the accident occurred, he was in fact a casual labourer and his wage would fluctuate with the work given.

From the evidence, the plaintiff as a labourer is paid per day or per week. At the time payment is made the contract for that day ends and therefore become unemployed until he is next engaged I believe that the plaintiff would not be entitled to a loss of income as he would have already earned it or alternatively waited to earn it.

If per chance he was in lawful employment, a letter from the employer stating he was a casual worker earning a particular sum, more so when it comes to the card system of number of days worked, would have been of assistance. In the absence of this I hereby reject the said claim and dismiss it.

I accordingly enter judgment for the plaintiff on the proved head of damages.

In Summary

- a) Male adult aged 28 years old in 1996
- b) Pedestrian run down by a motor vehicle
- c) Injuries:-
  - i) Bruises on face and head
  - ii) Fracture mid shaft femur
  - iii) Unconsciousness for 30 minutes
  - iv) Fracture of mid shaft left tibia
- d) Liability 100% against the defendant

e) Quantum:

I) General Damages

- i) Pain and suffering and loss of amenities Ksh.150,000
- i) Special Damages Withdrawn and abandoned
- iii) Loss of earning Nil\_\_\_\_\_

Total Ksh.,150,000/-

I award the cost of this suit to the plaintiff. Award interest on General Damages from the date of the judgment.

Dated this 10th day of February 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Kalwa & Co. Advocates for the plaintiff

Waruhiu K'owande & Co. Advocates for the defendant

